IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH

S.B. ARBITRATION APPLICATION NO.13/07

M/s. Eastern Track Udyog Pvt. Ltd.

Versus

U.O.I.

DATE OF ORDER :: 07/12/2007

HON'BLE MR. JUSTICE AJAY RASTOGI

Mr. Sudhanshu Kasliwal, for applicant
Smt. Anjoo Shukla, for respondent

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Instant application has been filed u/s.11 of Arbitration and Conciliation Act, 1996 for appointment of Arbitrator.

It is not disputed that parties have entered into agreement which contains clause of arbitration which is to be invoked if any dispute arises under the terms of agreement. Certain dispute arose with regard to manufacture and supply of fish plates. There is a clause in the agreement to resolve such disputes. Clause 2900, which is relevant for present purposes, is reproduced as under:

> "2900. **Arbitration**
>
> (a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided

for by these or the special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board, in case of contracts entered into by the Railway Board and by the Head of the Organization in respect of contracts entered into by the other organizations under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

[b] In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any person, of his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

[c] It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.

[d] The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.

[e] Upon every and any such reference, the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.

[f] Subject as aforesaid, the Arbitration Act, 1940 and the rules thereunder and any statute modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.

[g] The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.

[h] In this clause the authority to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise."

To resolve such disputes arises from the agreement entered and executed between the parties, the applicant sent a registered notice dated 9th November, 2006 which was duly served in the office of respondents on 1st December, 2006 and since they failed to make appointment of Arbitrator under Clause 2900 [supra], the applicant approached this court by filing instant application on 7th February, 2007.

It is pertinent to mention further that notices were issued to the present applicant on 23rd March, 2007 and it appears that on 23rd April, 2007 invoking Clause 2900 respondents made appointment of Arbitrator Ann.R/1.

Counsel for applicant submits that once notice was duly served, statutory period of 30 days have expired and even upto the date of filing application i.e. 7th February, 2007, respondents failed to make appointment of Arbitrator under agreement, their right of appointing Arbitrator ceases and respondents have no jurisdiction to invoke Clause 2900 for making appointment of Arbitrator thereafter. In support

of his submission, counsel placed reliance on the judgments of apex court in **Datar Switchgears Ltd. Vs. Tata Finance Ltd. [(2000) 8 SCC-151]** and in **Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd. [(2007) 7 SCC-684].**

Counsel for respondent, on the other hand, submits that before proceedings could have been initiated, appointment was made on 23rd April, 2007 and under Clause (c) of arbitration, Arbitrator can be appointed only in terms of contract. In view thereof, even if appointment has been made after filing of present application only person who can be appointed as Arbitrator is under Clause 2900 itself and none else.

I have considered the submission and perused the material on record.

So far as the controversy as to whether appointment can be made after expiry of 30 days or not, is concerned, it has already been examined in **Datar Switchgears Ltd. Vs. Tata Finance Ltd.** [supra], particularly, in Para 19, which is reproduced as under:

> “So far as cases falling under Section 11(6) are concerned -- such as the one before us -- no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of

> the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6),if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited."

So far as the submission made by counsel for respondent emphasizing Clause (c) of arbitration agreement is concerned, a similar like provision

came before the apex court in **Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd.** [supra] in which it was observed as under:

> "Clause 24 (iii) of the agreement which is relevant, reads as under:
>
> (iii) It is further a terms of this contract that no person other than the person appointed by the Director General of Supplies & Disposals as aforesaid should act as Arbitrator and that, if for any reason that is not possible, the matter is not to be referred to arbitration at all."
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> "Para 9. We are unable to countenance with the submission of the learned counsel for the appellant. Section 11(8) of the Act could have come to the aid of the appellant had the appellant appointed the arbitrator within 30 days from the date of receipt of request to do so from the respondent or the extended time as the case may be. In the present case, as noticed above, Section 11 (6) petition was filed on 30.3.2006 by the respondent. The appellant stated to have appointed one Dr. Gita Rawat on 15.5.2006, i.e. after Section 11(6) petition was filed by the respondent on 30.3.2006, which is not permissible in law. In other words, the appellants are stopped from making an appointment of the arbitrator in terms of

> Clause 24 of the agreement after Section 11 (6) petition is filed by the respondent. Once Section 11(6) petition is filed before the Court, seeking appointment of an arbitrator, the power to appoint an arbitrator in terms of arbitration clause of the agreement ceases."

In view of judgment of apex court, this court is of the opinion that once the applicant served notice in their office on 1st December, 2006 and the respondents failed to appoint upto the date of filing application u/s.11 of the Act in this court on 7th February, 2007, their right of appointment under Clause 2900 for resolving disputes available with the respondent ceases and it does not hold competence of making appointment thereafter.

According, the order passed by respondent making appointment of Arbitrator dated 23rd April, 2007 is hereby set aside and this court, in the facts and circumstances of the case, consider it proper to appoint Hon'ble Mr. Justice S.C. Mittal [Retd.], A-19, Vaishali Nagar, Queen's Road, Jaipur as sole Arbitrator to whom the dispute shall be referred. Remuneration of Rs.75,000/- & Rs.10,000/- towards expenses [to be equally shared] shall be paid to the sole Arbitrator by the parties.

With the above observations, the application stands disposed of. Copy of this order be sent to Hon'ble Mr. Justice S.C. Mittal [Retd.], A-19, Vaishali Nagar, Queen's Road, Jaipur, Arbitrator forthwith and parties are directed to appear before him on 19th January, 2008 at 4.30 PM or any other date, if informed by him.

[AJAY RASTOGI],J.

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